Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

NORFOLK & WESTERN RAILWAY COMPANY,
Petitioner,

v.

HOMER DYE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Circuit Court of Mingo County, West Virginia

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether it was error for the court below, in conflict with decisions of federal courts of appeals, state supreme courts and prevailing common-law principles, to award emotional-distress damages under the Federal Employers Liability Act ("FELA") to plaintiffs who presented no evidence of physical manifestation or other corroboration of injury related to their alleged fear of cancer?

Whether it was error for the court below, in conflict with decisions of the federal courts of appeals, state supreme courts and evolving common-law principles, not to apportion damages under FELA among tortfeasors?

LIST OF PARTIES

In addition to the parties listed in the caption, the following were plaintiffs below:

Jack A. Lambert

Leo Thacker

Jethro Darl Walker

Mellington A. Wheeler

RULE 29.6 STATEMENT

Petitioner Norfolk and Western Railway Company no longer exists as a separate entity and has been merged into the Norfolk Southern Railway Company, the parent of which is the Norfolk Southern Corporation. No other publicly held corporation owns more than 10% of petitioner's stock.

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PETITION FOR A WRIT OF CERTIORARI

Norfolk & Western Railway Company ("N&W") respectfully petitions this Court to issue a writ of certiorari to the Circuit Court of Mingo County, West Virginia.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

The consolidated judgments for which review is sought are: *Homer Dye* v. *Norfolk & Western Railway Company*, Civil Action No. 96-C-235; *Jack A. Lambert* v. *Norfolk & Western Railway Company*, Civil Action No. 97-C-98; *Leo Thacker* v. *Norfolk & Western Railway Company*, Civil Action No. 96-C-239; *Jethro Darl Walker* v. *Norfolk & Western Railway Company*, Civil Action No. 96-C-240; and *Mellington A. Wheeler* v. *Norfolk & Western Railway Company*, Civil Action No. 96-C-241. After a jury verdict in favor of the plaintiffs, the Circuit Court of Mingo County denied N&W's Motion for Judgment as a Matter of Law, or, in the Alternative, for a New Trial and Remittitur on September 23,

1999. The order of the circuit court denying N&W's motion is unpublished, and is reproduced in the Petition Appendix ("Pet. App.") at pages 3a-23a. The Supreme Court of Appeals of West Virginia denied N&W's Petition for Appeal on January 24, 2001. The supreme court's order is unpublished, and is reproduced at Pet. App. 1a-2a.

JURISDICTION

The order of the Supreme Court of Appeals of West Virginia was entered on January 24, 2001. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL, STATUTORY, OR OTHER LEGAL PROVISIONS

The relevant provisions of the Federal Employers Liability Act, 45 U.S.C. §§ 51, 53, and 56, are reproduced at Pet. App. 24a-25a.

STATEMENT OF THE CASE

In *Metro-North Commuter Railroad* v. *Buckley*, 521 U.S. 424 (1997), this Court held that FELA plaintiffs cannot recover damages for emotional distress related to the fear of developing asbestos-related cancer if they could not prove a "physical impact," namely, the onset of a disease caused by asbestos exposure. Turning *Buckley* on its head, and departing from established FELA and common-law principles adopted by other courts of appeals, the court below rendered a $2.3 million judgment against N&W in favor of the five respondents who, while arguably adducing evidence of the requisite "physical impact," presented no objective proof of any emotional injury whatsoever, much less the proof of physical or psychiatric manifestations of emotional injury that the common law has always required of plaintiffs claiming negligently inflicted emotional distress. Instead, the court upheld large judgments to respondents based on their bare

testimony that they were concerned that they would eventually contract cancer from asbestos exposure; it did so even though a number of them expressly disavowed any "fear" of cancer. Compounding the wrong, the court below instructed the jury that, if it found that N&W's conduct caused the respondents' injuries to any degree, it should hold N&W liable for all of their damages, despite the clear presence of other causes independent of their employment with N&W.

This case presents two issues of critical importance to the administration of FELA, and over which the courts are divided, namely: (1) whether a plaintiff can recover emotional-distress damages even without any physical manifestation or other objective medical corroboration of such distress; and (2) whether a railroad is liable for the full amount of an employee's injury on a strict theory of joint and several liability, even though the evolving common law has generally rejected such liability and there is uncontroverted evidence of acts occurring outside the course of his employment with the railroad that likely caused his injuries.

Review of the ruling below is especially critical because the highly coordinated railroad-plaintiff's bar has targeted notoriously pro-plaintiff jurisdictions in West Virginia for massive FELA suits involving out-of-state plaintiffs. Given the absence of any mandatory appellate review in the West Virginia state courts and the generous venue provisions of FELA, the ruling below is likely to be the principal determinant of FELA liability for asbestos-related claims of the major eastern railroads (CSX and Norfolk Southern, the successor of N&W), both of which operate in West Virginia. See *infra* at 26-29. More broadly, the immediate resolution of these issues is vital to the railroad industry, which otherwise faces exactly what the Court has sought to avoid in its recent FELA opinions: significant, unpredictable liability for a flood of unsubstantiated claims of emotional distress.

Statutory Background

Congress enacted FELA as a broad remedial statute to ensure relief for injured railroad employees who work under perilous conditions. See *Urie* v. *Thompson*, 337 U.S. 163, 181 (1949). Consistent with its remedial nature, FELA lowers certain common-law hurdles that historically prevented recovery for plaintiffs. For example, FELA reduces the level of causation which employees must demonstrate: "Every common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury . . . resulting *in whole or in part* from the negligence of any of the officers, agents, or employees of such carrier . . . ." 45 U.S.C. § 51 (emphasis added). FELA also eliminated the traditional tort defense of contributory negligence. Therefore, an employee's own negligence "shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." *Id.* § 53. Employees also have greater flexibility to bring FELA actions in any state or federal district "of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action." *Id.* § 56. Moreover, if the plaintiff selects a state forum, defendants may not remove these actions to federal court. See 28 U.S.C. § 1445(a).

Nonetheless, railroad employers are not insurers of an employee's welfare under FELA. See *Inman* v. *Baltimore & Ohio R.R.*, 361 U.S. 138, 140 (1959). Liability is predicated on proof that the railroad's negligence caused injury to the employee. Absent express statutory departures from the common law, the requisite negligence under FELA is founded on the common-law concepts of negligence "as established and applied in the federal courts." *Urie*, 337 U.S. at 174; see also *Norfolk & W. Ry.* v. *Liepelt*, 444 U.S. 490, 493 (1980) ("It has long been settled that questions concerning the measure of damages in an FELA action are federal in

character."). The scope of FELA is "a federal question, not varying in accordance with the differing conceptions of negligence applicable under state and local laws." *Urie*, 337 U.S. at 174. Indeed, one of the purposes of FELA was to "create uniformity throughout the Union" with respect to the financial responsibility of railroads for injuries to their employees. H.R. Rep. No. 60-1386, at 3 (1908). Uniformity is vital in light of the wide latitude FELA plaintiffs have to select a forum. See 45 U.S.C. § 56.

To promote this uniformity, this Court must provide guidance to state and federal courts on issues that are important to the administration of FELA. In the absence of express statutory provisions, the Court accords "great weight" to evolving common-law principles in delineating the unspecified bounds of recovery under FELA. *Consolidated Rail Corp.* v. *Gottshall*, 512 U.S. 532, 544 (1994). In turn, state courts must apply such federal law rather than relying on their own state law governing ordinary negligence actions. See *Liepelt*, 444 U.S. at 493; *Sabb* v. *Norfolk & Portsmouth Belt Line R.R.*, 278 S.E.2d 795, 797 (Va. 1981).

The text of FELA is mostly silent on the two issues raised in this petition, and thus these are issues to be resolved based on evolving principles of common law adapted to the circumstances of the railroad industry, *Gottshall*, 512 U.S. at 555-56, with due regard for "the general impact, on workers as well as employers, of the general liability rules they would thereby create." *Buckley*, 521 U.S. at 438. First, although this Court has recognized that, in this context, FELA's purpose is to authorize recovery in damages for "a *serious* and negligently caused emotional harm," *id.* at 438 (emphasis added), and has adverted to the majority rule requiring physical manifestations of severe emotional injury, *Atchinson, Topeka & Santa Fe Railway* v. *Buell*, 480 U.S. 557, 567 n.13, 568-69 & n.18 (1987), it has not yet had occasion to adopt that rule expressly in FELA actions. See *Gottshall*, 512 U.S. at 554. Second, this Court has not yet resolved the conflict in

the lower courts over whether FELA permits apportionment of liability among multiple tortfeasors. Both of these questions leave fundamental gaps in FELA doctrine that require immediate resolution.

Factual Background

The plaintiffs below, five retired employees of N&W, filed complaints against their former employer under FELA in the Circuit Court of Mingo County, West Virginia. The basis of their complaint was N&W's alleged failure to provide them with a reasonably safe workplace because of their exposure to asbestos and other dusts. The plaintiffs alleged that they had contracted asbestosis, and sought damages for, among other things, a claimed concern about contracting cancer sometime in the future.

At trial, it was contested whether any of the plaintiffs had any asbestos-related condition. The plaintiffs did not present any testimony of treating physicians. Instead, a physician hired to examine the plaintiffs solely for purposes of the litigation testified that there were indications of asbestosis, a set of lung disorders from the inhalation of asbestos dust. The plaintiffs' medical witnesses also testified that the plaintiffs' workplace exposure to asbestos may have caused their asbestosis. They also testified that asbestos exposure is correlated with cancer. Significantly, none of the plaintiffs' witnesses testified that asbestosis itself increases the risk of cancer.

Indeed, other medical evidence at trial established that there are four separate disease processes associated with exposure to asbestos: asbestosis, pleural thickening, malignant mesothelioma (a rare cancer of the lining of the lung cavity), and certain other cancers. Although all these diseases may be associated with the same asbestos exposure, none evolves into the other and there is no established connection among the diseases (*i.e.*, asbestosis does not turn into lung cancer or mesothelioma, nor does lung cancer or mesothelioma become

asbestosis). The association between asbestos exposure and certain cancers, including mesothelioma, is made epidemiologically, and not medically. The fact that asbestosis and asbestos-related cancer are separate diseases that are not medically linked has also been widely recognized among courts. See, *e.g.*, *Jackson* v. *Johns-Manville Sales Corp.*, 727 F.2d 506, 517 (5th Cir. 1984) (asbestosis itself does not lead to an increased risk of cancer); *Pierce* v. *Johns-Manville Sales Corp.*, 464 A.2d 1020, 1025 (Md. 1983) ("asbestosis and lung cancer are separate and distinct latent diseases that are not medically linked").[1]

The parties also disputed whether N&W had been negligent at all, and whether the plaintiffs had had substantial exposure to asbestos during their railroad employment that caused their alleged current conditions. There was extensive testimony that two of the plaintiffs had far more substantial exposure to asbestos fibers during decades of subsequent employment elsewhere. Respondent Mellington Wheeler worked at N&W for only six years in the 1950s, and later worked at a chemical company for 33 years. Wheeler testified at trial that he was not aware of having been exposed to asbestos at N&W, but that he had frequent direct exposure to asbestos at the chemical company. Respondent Leo Thacker testified that he had worked for N&W for eight years in the 1930s and 1940s, and thereafter worked for more than 30 years in construction with frequent exposure to asbestos. The plaintiffs testified as to other contributing factors to their alleged injuries, including smoking up to two packs of cigarettes per day for extended periods of time. The plaintiffs also had concurrently filed separate lawsuits against numerous asbestos manufacturers in another West Virginia county. In those

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[1] *See also Joyce* v. *A.C. & S., Inc.*, 785 F.2d 1200, 1205 (4th Cir. 1986); *Wilson* v. *Johns-Manville Sales Corp.*, 684 F.2d 111, 117 n.33 (D.C. Cir. 1982) (Ginsburg, J.); *Devlin* v. *Johns-Manville Corp.*, 495 A.2d 495, 501 (N.J. Super. Ct. Law Div. 1985); *Eagle-Picher Indus., Inc.* v. *Cox*, 481 So. 2d 517, 522 (Fla. Dist. Ct. App. 1985).

lawsuits, pleadings from which are part of the record below, the plaintiffs alleged that their injuries were "the sole, direct, and proximate result" of the acts and omissions of the manufacturers.

The parties also contested whether any of the plaintiffs had suffered any emotional distress. The plaintiffs testified as to varying degrees of concern about contracting cancer. Respondents Thacker, Wheeler, and Jethro Daryl Walker testified that, at most, they had a "concern" about cancer. Thacker testified, "it'll cross my mind about cancer, but . . . I'm not afraid of any disease." Wheeler testified that he only thought about cancer sometimes when he had trouble breathing in the middle of the night. Respondent Jack Lambert admitted that he had no "fear" of cancer: "No, right now, I'm not afraid of it." Respondent Homer Dye testified that he was more concerned with taking care of his sister than contracting cancer. Indeed, none of the plaintiffs testified as to even having a "fear" of cancer. Furthermore, not only did none of the plaintiffs testify as to the existence of severe emotional injury, but none presented evidence of any emotional or physical manifestation of their concerns, or any other objective corroboration of their bald assertions of emotional distress.

Despite this lack of supporting evidence, the court below denied N&W's motion to exclude all evidence regarding cancer at trial due to its irrelevant and highly prejudicial nature. Throughout the trial and in closing arguments, the plaintiffs' counsel emphasized the need to compensate them for their fear of cancer and future injuries: "That's what you've got to compensate for – the fear of cancer – you know, one of the things we're saying about these guys i[s] they're not totally disabled."

In instructing the jury on damages, the court below instructed the jury that "none of the plaintiffs have offered evidence that he actually has cancer or that he will, with reasonable certainty[,] develop cancer in the future.

Therefore, you cannot award damages to plaintiffs for cancer or for any increased risk of cancer." Pet. App. 36a. Nonetheless, it instructed the jury that "any plaintiff who has demonstrated that he has developed a reasonable fear of cancer that is related to proven physical injury from asbestos is entitled to be compensated for that fear as a part of the damages you may award for pain and suffering." *Id.* The jury was further instructed to find N&W liable if its negligence "contributed, however slightly, to the plaintiff's injuries," and "not to make a deduction for the contribution of non-railroad exposures." *Id.* at 35a. The jury returned a verdict in favor of the plaintiffs, collectively awarding them $2,280,000 against N&W.

The Circuit Court Decision

The court below upheld the jury verdict in favor of the plaintiffs in an order entered on September 23, 1999. Pet. App. 3a. The Circuit Court based its order on limited findings of fact, which referred to the plaintiffs' own testimony of their "fears or concerns about developing cancer" and medical testimony as to the greater risk of developing cancer from asbestos exposure. *Id.* at 4a-5a. In its Conclusions of Law, the court below relied on the plaintiffs' testimony "concerning their distress at learning of their disease and the increased risk of developing cancer." *Id.* at 10a. The court below did not base its conclusion – as it could not – on any other evidence of the plaintiffs' "fear" of cancer. The court below also relied on a recent decision of the Supreme Court of Appeals of West Virginia. See *id.* at 10a-11a (citing *Bower* v. *Westinghouse Elec. Corp.*, 522 S.E.2d 424 (W.Va. 1999)). *Bower*, a non-FELA case, involved a claim for future medical monitoring costs, not negligent infliction of emotional distress.

Second, the court below found no error in its jury instruction that N&W was liable for all damages as long as its negligence caused any portion of the plaintiffs' injuries. The court below found this instruction "compelled by the

language of FELA, the indivisible nature of the Plaintiffs' injuries, and the established doctrine of joint and several liability." Pet App. 18a. The court below also justified its refusal to instruct the jury on contributory negligence related to the plaintiffs' smoking, on the basis that their "occupational diseases could not be caused by cigarette smoking." *Id.* at 19a. The court below made no reference to the impact of the plaintiffs' smoking on their "fear of cancer" claim. Having no right of appellate review (for there are no intermediate appellate courts in the West Virginia state court system), N&W petitioned the West Virginia Supreme Court of Appeals for review, but its petition was denied.

REASONS FOR GRANTING THE PETITION

There can be no doubt that FELA is a remedial statute for the benefit of injured railroad employees. At the same time, FELA is not intended to transform employers into the "insurers of the emotional well being and mental health of their employees." *Gottshall*, 512 U.S. at 554; see also *Buckley*, 521 U.S. at 438 (courts "must consider the general impact, on workers as well as employers, of the general liability rules they would thereby create"). As the cases below illustrate, the West Virginia courts have crossed the line and greatly expanded the proper recoveries for employees under FELA. Plaintiffs are now able to recover for allegations of emotional distress without presenting any corroborating evidence of any such injury. Moreover, the court has denied apportionment of any of these ever-increasing damages among other tortfeasors, even in cases in which the railroad employer is at best marginally responsible for the employee's injuries. As a result, railroad employers are broadly liable to their employees for health problems arising over the course of their entire lives, and not just their term of employment.

The court below has joined other state and federal courts in adopting these legal standards of liability and apportionment

in conflict with the decisions of other lower courts and principles embodied in this Court's decisions. By resolving this conflict, the Court can ensure that FELA is given the "uniform application throughout the country essential to effectuate its purposes." *Dice* v. *Akron, Canton, & Youngstown R.R.*, 342 U.S. 359, 361 (1952).

I. THE COURT SHOULD RESOLVE THE CONFLICT OF AUTHORITY AS TO WHETHER FELA PLAINTIFFS MAY RECOVER EMOTIONAL-DISTRESS DAMAGES WITHOUT ANY CORROBORATING MANIFESTATION OF EMOTIONAL INJURY.

Section 1 of FELA states that employers "shall be liable in damages to any person suffering injury." 45 U.S.C. § 51. The statute does not define the term "injury" – much less its specific meaning for claims of negligent infliction of emotional distress. Based on its review of common-law developments, this Court has recognized that emotional distress is a compensable injury under FELA. *Gottshall*, 512 U.S. at 550. In *Gottshall* and *Buckley*, the Court was careful to embrace one common-law limitation, the "zone of danger" test. However, the Court has not directly addressed the other vital common-law limitation on emotional-distress claims: namely, that emotional injury, in order to be compensable, must be corroborated by physical manifestations (or objective medical symptoms) of injury. In conflict with other courts, the court below failed to vindicate this limitation by awarding millions of dollars based solely on the bare, subjective testimony of the plaintiffs regarding their "fear" of cancer.[2] It

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[2] Petitioner does not challenge in this petition the right of the jury to determine whether respondents should be awarded damages for pain and suffering or medical expenses arising from the asbestosis itself (such as the occasional shortness of breath which one of the defendants claimed). Nonetheless, even if those were permissible bases of recovery, the error in instructing the jury that it may award damages for fear of cancer without any physical manifestation of emotional injury requires reversal of the

is imperative that this Court intervene to prevent this unwarranted expansion of FELA liability.

The court below turned a blind eye to sound common-law principles in allowing recovery for uncorroborated emotional injuries. As an initial matter, the court ignored this Court's decision in *Gottshall* in awarding the plaintiffs pain and suffering damages for their "fear of cancer" claims. Pain and suffering "traditionally have been used to describe sensations *stemming directly* from a physical injury or condition." *Gottshall*, 512 U.S. at 544 (internal quotation marks omitted) (emphasis added). The plaintiffs claimed to have contracted only asbestosis, which itself has been widely found not to lead to cancer. See, e.g., *Jackson*, 727 F.2d at 517; *Pierce*, 464 A.2d at 1025. Although the physical injury of asbestosis and the claimed emotional injury of fear of cancer may arise from the same asbestos exposure, fear of cancer is not distress that stems directly from the asbestosis, and therefore it should not be compensable as pain-and-suffering damages from the asbestosis itself. See *Gottshall*, 512 U.S. at 544 (negligent infliction of emotional distress contemplates mental and emotional injury that is "not directly brought about by a physical injury"); *Potter* v. *Firestone Tire & Rubber Co.*, 863 P.2d 795, 805 (Cal. 1993) (characterizing pain-and-suffering damages as "parasitic damages" which compensate "a reasonable fear of a future harm *attributable to the injury*") (emphasis added). As a result, the court below could only have awarded damages for fear of cancer as a form of negligently inflicted emotional distress. See *id.* at 807-08 (analyzing parasitic pain-and-suffering damages as distinct

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entire judgment. *See Fillippon* v. *Albion Vein Slate Co.*, 250 U.S. 76, 83 (1919) ("in jury trials erroneous rulings are presumptively injurious, especially those embodied in instructions to the jury; and they furnish ground for reversal unless it affirmatively appears that they were harmless"); *Yazoo & Miss. Valley R.R.* v. *Mullins*, 249 U.S. 531, 533 (1919) (same); *see also United States* v. *River Rouge Improvement Co.*, 269 U.S. 411, 421 (1926).

from claim for nonparasitic damages for emotional distress for asbestos exposure). But regardless of whether damages are awarded as pain and suffering, or as a separate claim for negligent infliction of emotional distress, common-law limits on recovery that are consonant with the purposes of FELA must be observed. *Gottshall*, 512 U.S. at 557; *Smith* v. *Union Pac. R.R.*, 236 F.3d 1168, 1171 (10th Cir. 2000).

A. FELA Incorporates Common Law Limitations On Emotional-Distress Damages.

The common law long forbade the recovery of emotional-distress damages, a rule said to "'rest upon the elementary principle that mere mental pain and anxiety are too vague for legal redress where no injury is done to person, property, health, or reputation.'" *Southern Express Co.* v. *Byers*, 240 U.S. 612, 615 (1916) (quoting *Cooley on Torts* 94 (3d ed.)). This traditional reluctance derived from the distinctive nature of emotional distress in comparison with physical injuries: (1) it is often temporary and relatively trivial; (2) it is less ascertainable, and therefore more easily falsified or imagined; and (3) it is less apparent, and therefore operates as a more remote consequence of a defendant's action. W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 54, at 360-61 (5th ed. 1984); see also *Gottshall*, 512 U.S. at 545. When it finally recognized the tort of negligent infliction of emotional distress, the common law placed severe restrictions on its recovery. Those restrictions were of two kinds. First, the common law limited the kind of conduct that was actionable. See *id.* at 546-49 (describing the three principal tests for actionable conduct as requiring a "physical impact" upon the plaintiff, placement of the plaintiff in a "zone of danger," or endangerment of a "relative bystander"); *Restatement (Second) of Torts* § 436 (1965). Second, the common law restricted the type of negligently inflicted emotional injuries that are compensable, requiring plaintiffs to present some objective evidence of a manifestation of their injuries: "the negligent actor is not liable when his conduct results in the

emotional disturbance alone, without the bodily harm or other compensable damage." *Id.* § 436A & cmt. a; see also *id.* § 436 cmt. d (requiring proof that "the negligent conduct be a substantial fact[or] in bringing about the fright and that the fright also be a substantial factor in bringing about the illness"). Most jurisdictions continue to adhere to the requirement of physical manifestations (or objective, medically diagnosed symptions) of emotional injury as a prerequisite of recovery.[3]

In *Gottshall*, the Court faced the question of whether claims for negligent infliction of emotional distress are cognizable under FELA, and in what circumstances. 512 U.S. at 544. In light of FELA's remedial purpose, the Court interpreted the employee's statutory entitlement to recover for "injury" caused by the railroad's negligence to include emotional injury, for "severe emotional injuries can be just as debilitating as physical injuries." *Id.* at 550 (internal quotation marks omitted). This Court recognized the two major restrictions at common law on emotional-distress damages, noting that "[c]ourts . . . have placed substantial limitations on the class of plaintiffs that may recover for emotional injuries *and on the injuries that may be compensable*." *Id.* at 546 (emphasis added). In *Gotshall*, the second limitation (on the kind of emotional injuries that are compensable) was not in dispute; the two plaintiffs in *Gottshall* had suffered severe and manifest emotional injury,

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[3] Mary Donovan, Comment, *Is The Injury Requirement Obsolete In A Claim For Fear Of Future Consequences?*, 41 UCLA L. Rev. 1337, 1363-68 (1994); *Payton* v. *Abbot Labs*, 437 N.E.2d 171, 174-75 & n.5 (Mass. 1982); *see, e.g.*, *First Nat'l Bank* v. *Drier*, 574 N.W.2d 597, 600 (S.D. 1999); *Beynon* v. *Montgomery Cablevision Ltd. Partnership*, 718 A.2d 1161, 1163 (Md. 1998); *Hegel* v. *McMahon*, 960 P.2d 424, 431 (Wash. 1998); *Leaon* v. *Washington County*, 397 N.W.2d 867, 875 (Minn. 1986); *Barnhill* v. *Davis*, 300 N.W.2d 104, 107-08 (Iowa 1981); *Corso* v. *Merrill*, 406 A.2d 300, 304 (N.H. 1979); *see also Restatement (Second) of Torts* § 436A cmt. c (1965).

including major depression, post-traumatic stress disorder, and a nervous breakdown. See *id.* at 536-37, 539. This Court addressed the second limitation only in the context of rejecting the claim that the genuine-injury requirement obviated the need for the first limitation on the type of conduct that was actionable. It held that "testing for the genuineness of an injury *alone* cannot appreciably diminish the possibility of infinite liability," because without restrictions on the type of conduct giving rise to liability, railroads would have no predictable standards to guide their conduct and damages would be awarded inconsistently. *Id.* at 552 (emphasis added). Accordingly, this Court restricted the kind of conduct that was actionable (and thus the type of plaintiffs who could sue), adopting the "zone of danger" test as the standard most consonant with FELA. *Id.* at 554-56. This Court thus allowed "recovery for emotional injury to those plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct." *Id.* at 547-48.

In *Buckley*, the Court elaborated on the meaning of the term "physical impact" in the context of toxic exposure. 521 U.S. at 430. Despite his exposure to asbestos during his employment, Buckley did not allege that he suffered from any asbestos-related disease or exhibited any physical or psychiatric symptoms resulting from his asbestos exposure. The Second Circuit allowed recovery for emotional distress because (1) Buckley presented some objective proof of a injury apart from his own testimony; and (2) Buckley's contact with asbestos constituted a "physical impact." *Buckley* v. *Metro-North Commuter R.R.*, 79 F.3d 1337, 1346 (2d Cir. 1996), *rev'd*, 521 U.S. 424 (1997). This Court addressed only the second ground in reversing the Second Circuit:

> The case before us . . . focuses on the italicized words "physical impact." . . . In our view, however, the

> "physical impact" to which *Gottshall* referred does not include a simple physical contact with a substance that might cause a disease at a substantially later time – where that substance, or related circumstance, threatens no harm other than that disease-related risk.

Buckley, 521 U.S. at 430. Other than to reiterate *Gottshall*'s admonition that the test for the genuineness of emotional injury "alone" is insufficient to safeguard defendants from meritless claims, *id.* at 434, and that FELA required additional categorical restrictions on the class of plaintiffs who can sue, the Court in *Buckley* did not address the fundamental requirement that emotional injury be corroborated by some objective manifestation.

The Court has previously acknowledged the importance of this unresolved question in cases decided on alternative grounds. In *Atchinson, Topeka & Santa Fe Ry.* v. *Buell*, 480 U.S. 557 (1987), the Court recognized that "severe emotional injury . . . has generally been required to establish liability for purely emotional injury." *Id.* at 567 n.13; see also *id.* at 568-69 & n.18. The Court later noted in *Gottshall* that "[m]any jurisdictions that follow the zone of danger or relative bystander tests also require that a plaintiff demonstrate a 'physical manifestation' of an alleged emotional injury, that is, a physical injury or effect that is the direct result of the emotional injury, in order to recover." 512 U.S. at 549 n.11; see *id.* at 544 ("The injury we deal with here is mental or emotional harm (such as fright or anxiety) that is caused by the negligence of another and that is not directly brought about by a physical injury, but that may manifest itself in physical symptoms."). Most recently in *Buckley*, the Court acknowledged its adoption of the "zone of danger" test in reliance on state cases where physical impact "caused, or might have caused, immediate traumatic harm." 521 U.S. at 430.

Justice Ginsburg twice has separately encouraged the resolution of this exact question: "a solution the Court does

not explore . . . would be to require such 'objective medical proof' and to exclude, as too insubstantial to count as 'injury,' claims lacking this proof." *Gottshall*, 512 U.S. at 571 (Ginsburg, J., dissenting). In *Buckley*, Justice Ginsburg found that Buckley's contact with asbestos constituted a "physical impact," but concurred in the denial of recovery "because Buckley did not present objective evidence of severe emotional distress." *Buckley*, 521 U.S. at 445 (Ginsburg, J., concurring in part and dissenting in part). Thus, the Court has yet to address directly this fundamental element of an emotional-distress claim, but it should do so now not only to redress the clear injustice of the judgment below but also to resolve a decisional conflict among the lower courts.

B. This Court Should Resolve The Conflict Of Authority Over Whether FELA Limits Recovery To Objectively Manifest, Severe Emotional Injury.

Despite the clarity of the common law rule, there is considerable disarray among the courts of appeals and the state courts over what emotional injuries are compensable under FELA. The decision below is in direct conflict with decisions of the First Circuit and state supreme courts that hew to the traditional requirement that emotional injuries are compensable only if manifested in some form. See *Moody* v. *Maine Cent. R.R.*, 823 F.2d 693, 696 (1st Cir. 1987) (rejecting claims of injury "manifested only by subjective pain" and unsupported by "any medical opinion as to causation"); *Bullard* v. *Central Vermont Ry.*, 565 F.2d 193, 197 (1st Cir. 1977) ("If there is to be compensation for nervousness, depression, or other mental conditions . . ., there must be evidence from which a jury can make an informed judgment as to the existence, nature, duration and seriousness of the condition."); *Alabama Great S. R.R.* v. *Jackson*, 587 So.2d 959, 965 (Ala. 1991) (upholding award of damages where "the consequences of th[e] injury caused . . . various physical problems"); *McMillan* v. *National R.R. Passenger Corp.*, 648

A.2d 428, 433 n.3 (D.C. 1994) (FELA plaintiff must show "serious and verifiable" emotional injuries); cf. *Dodge* v. *Cotter Corp.*, 203 F.3d 1190, 1202 (10th Cir.) (requiring, in non-FELA action, evidence of a "chronic objective condition caused by their increased risk of developing cancer to permit their recovery for emotional distress damages"), *cert. denied*, 121 S. Ct. 71 (2000). The decision below is also in conflict with two Fifth Circuit decisions under the Jones Act,[4] the first of which required evidence of "serious mental distress" without addressing the precise nature of injury that would be compensable, *Hagerty* v. *L & L Marine Services, Inc.*, 797 F.2d 256, 256 (5th Cir. 1986), and the second of which upheld dismissal of a claim for intentional infliction of emotional distress because the plaintiff "failed to prove she suffered any physical manifestations of her alleged emotional injury," *Martinez* v. *Bally's Louisiana, Inc.*, No. 00-30119, 2001 WL 237222 (5th Cir. Mar. 26, 2001).

On the other side of the coin, the Second Circuit, although not going so far as the court below, has rejected the requirement of physical injury or medically diagnosed symptons, allowing recovery if there is *any* objective evidence (no matter how thin) corroborating the plaintiff's subjective testimony that asbestos exposure caused him fear and anger (such as a contemporaneous complaint to a supervisor about negligent conduct). *Buckley*, 79 F.3d at 1346, *rev'd on other grounds*, 521 U.S. 424 (1997). In a statute of such importance to railroads and railroad workers alike, with broad venue provisions that invite forum shopping, it is imperative that this Court resolve this conflict and uncertainty now.

The Court is faced not only with considerable conflict and uncertainty on this issue in the federal and state courts, but

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[4] The Jones Act incorporates FELA doctrine, and precedent under one Act governs cases brought under the other. *Kernan* v. *American Dredging Co.*, 355 U.S. 426, 431-32 (1958).

also a serious threat to the important policies underlying its recent restrictions on emotional-distress claims under FELA. In *Gottshall*, the Court adopted the "zone of danger" test in order to prevent "the potential for a flood of trivial suits, the possibility of fraudulent claims that are difficult for judges and juries to detect, and the specter of unlimited and unpredictable liability." 512 U.S. at 557 (internal citation and quotation marks omitted). In *Buckley*, the Court considered these policy goals at length in justifying its further restriction on emotional-distress claims. 521 U.S. at 433-34. Specifically, the Court noted that these policy goals would be eviscerated where, "apart from Buckley's own testimony, there was virtually no evidence of distress." *Id.* at 433. If plaintiffs here are allowed to recover on uncorroborated claims of emotional distress, the Court's policy-based restrictions on FELA claims will become a nullity. Requiring corroborating evidence of an emotional-distress claim addresses these problems and best serves the underlying purpose of FELA: the compensation of employees who suffer actual and serious injuries.

Although this case comes from a trial court's judgment, it is a perfect vehicle for resolving the issue that has vexed the lower courts and that this Court has reserved. It is inconceivable that there will ever be a case where there is less evidence suggesting cognizable emotional injury than here. Under the ruling below, practically every former railroad worker with asbestosis is *ipso facto* entitled to seek emotional-distress damages, even if he disavows any true "fear" of getting cancer. FELA will become a worker-insurance statute without limit, and railroads will be exposed to a "flood of relatively trivial claims [for which] liability may be imposed for highly remote consequences of a negligent act." *Gottshall*, 512 U.S. at 545. This problem is particularly exacerbated in the FELA context, where plaintiffs face fewer substantive and procedural hurdles for recovery. This Court should act now to resolve the conflict of authority, eliminate the injustice of

the unlawful judgments below, and vindicate its policy-based restrictions on emotional-distress claims under FELA.

II. THIS COURT SHOULD RESOLVE THE SQUARE CONFLICT OF AUTHORITY ON THE CRITICAL QUESTION OF APPORTIONMENT OF DAMAGES UNDER FELA.

The court below instructed the jury that, if it found N&W in the slightest degree liable for respondents' asbestos-related injuries, it should hold N&W liable for 100% of the damages despite uncontroverted evidence of numerous other causes of respondents' injuries. The court justified its instruction based on the language of FELA and the traditional concept of joint and several liability, which is still recognized in only a minority of jurisdictions – including West Virginia. Pet. App. 18a. As railroad employers now face substantial liability for entirely uncorroborated claims, apportionment has become a vital issue of law that remains unanswered in the FELA context. The decision below is in square conflict with the Supreme Court of Pennsylvania, which requires apportionment of damages in FELA asbestos cases, and also conflicts with the reasoning of the Fourth, Seventh, and Tenth Circuits and the Nebraska Supreme Court, all of which have apportioned damages so that a FELA defendant is responsible only for those injuries its negligence caused. Resolution of this question is critical given that Pennsylvania and West Virginia are adjoining states, and the plaintiff's bar has every incentive and ability to shift Pennsylvania asbestos-related claims to the West Virginia courts. See *infra* at 26-29.

The history and language of FELA suggest that damages should be apportioned among those who are responsible for the injuries of an employee. FELA's adoption of a comparative negligence regime was radical at the time. See 45 U.S.C. § 53; see also *Coats* v. *Penrod Drilling Corp.*, 61 F.3d 1113, 1147-48 (5th Cir. 1995) (en banc) (Garwood, J., dissenting). Under FELA, a railroad carrier shall be liable to "any person suffering injury *while he is employed by such carrier*," and

not for injuries suffered outside the scope of employment. 45 U.S.C § 51 (emphasis added). This statutory framework, together with this Court's construction of FELA in accordance with evolving principles of common law, require a departure from the strict principles of joint and several liability and the establishment of some standard of apportionment in FELA actions.

The Supreme Court of Pennsylvania has recognized the necessity of apportionment of damages under FELA. In *Dale* v. *Baltimore & Ohio R.R.*, 552 A.2d 1037 (Pa. 1989), the plaintiff sued his employer for injuries caused in part by his exposure to asbestos in the course of his employment. The Supreme Court of Pennsylvania noted that 45 U.S.C. § 51, in isolation, did not clearly call for apportionment where "the railroad's negligence was not the cause of all of the damages." *Dale*, 552 A.2d at 1041. The court resolved this ambiguity based on its reading of 45 U.S.C. § 53, which specifically mandates apportionment for a plaintiff's contributory negligence:

> If there is a statutory requirement that FELA awards shall be diminished by the amount of an employee's contributory negligence, it is implicit in the statutory scheme that liability attaches to a negligent act only to the degree that the negligent act caused the employee's injury, and thus that an employer is financially responsible only for those damages which it has caused. Thus, we hold that an FELA employer whose employee has been injured partially by the employer's negligence and partially by other causes, whether those other causes relate to a pre-existing condition or to a concurrent, contemporary cause arising from the circumstances of the injury, must pay damages only for those injuries attributable to its negligence.

Id. This holding is in square conflict with the decision below.

The Seventh Circuit also apportioned damages where a FELA plaintiff was seeking recovery for two injuries – only one of which was caused by his employer's negligence. *Shupe* v. *New York Cent. Sys.*, 339 F.2d 998 (7th Cir. 1965). The Seventh Circuit held that a FELA plaintiff "cannot recover damages which are not proximately caused by defendant's alleged negligence." *Id.* at 1000. In these circumstances, the plaintiff "ha[s] the burden of proving what proportion, if any, of the alleged [damages] was caused by the [defendant's negligence]." *Id.*

Courts have also apportioned damages in FELA actions involving pre-existing conditions. The Fourth Circuit upheld a jury instruction asserting that the plaintiff was not entitled to damages "for any condition existing prior to the alleged injury for which (the railroad) was not in any way responsible in causing or aggravating." *Akers* v. *Norfolk & W. Ry.*, 417 F.2d 632 (4th Cir. 1969) (internal quotation marks omitted). This instruction was a "correct statement of the law" in not holding the defendant responsible for injuries it did not cause. *Id.* The Seventh Circuit also upheld a jury instruction to apportion damages between a pre-existing condition and its aggravation as a result of the employer's negligence. *Varhol* v. *National R.R. Passenger Corp.*, 909 F.2d 1557, 1565 (7th Cir. 1990). The Supreme Court of Nebraska recently upheld a similar instruction prohibiting recovery for pre-existing conditions in a FELA action. *Gustafson* v. *Burlington N. R.R.*, 561 N.W.2d 212, 219-20 (Neb. 1997).

Courts have apportioned damages in FELA actions even where plaintiffs contend that there is insufficient evidence to allocate percentages of responsibility among the multiple causes of injury. The Tenth Circuit upheld a jury's apportionment of damages between a plaintiff's pre-existing condition and the aggravation of that condition as a result of his employer's negligence. *Sauer* v. *Burlington N. R.R.*, 106 F.3d 1490, 1493 (10th Cir. 1996). The court found that expert testimony was not required for apportionment: "The

extent to which an injury is attributable to a preexisting condition or prior accident need not be proved with mathematical precision or great exactitude. The evidence need only be sufficient to permit a rough practical apportionment. Although apportionment may be difficult, like comparative negligence it is a question for which juries are well suited." *Id.* at 1494 (internal citations omitted). Unlike the court below, these courts recognize the principle that railroads under FELA may only be held responsible for that part of the injury attributable to the railroad's negligence.

On the other side of the divide, some courts have refused to apportion damages in FELA actions based on the traditional concept of joint and several liability. Under joint and several liability, a defendant is liable for the entire amount of damages, and must then seek contribution or indemnity from the other tortfeasors. The Fifth Circuit has interpreted FELA to incorporate the traditional rule of joint and several liability. *Coats*, 61 F.3d at 1134. The court reached this conclusion based on a statutory interpretation in direct conflict with the Supreme Court of Pennsylvania: "section 53 of the FELA provides that a plaintiff may recover the total amount of his judgment less that part representing his own contributory negligence. There is no exception in [FELA] for cases in which one or more of the defendants fails to pay its share." *Id.* (internal citation omitted). In dissent, five of the judges believed that apportionment might be permitted in FELA actions, particularly in light of the statutory consideration of comparative fault between the plaintiff and defendant. *Id.* at 1169-70 (Garwood, J., dissenting).

The Eighth Circuit has joined the Fifth Circuit in concluding that joint and several liability prohibits apportionment in FELA actions. *Lockard* v. *Missouri Pac. R.R.*, 894 F.2d 299, 305 (8th Cir. 1990). The Supreme Court of Kansas also has held that a FELA defendant "must bear all of the loss sustained by an employee which is caused jointly by the fault of the carrier and third persons." *Gaulden* v.

Burlington N., Inc., 654 P.2d 383, 391 (Kan. 1982). The employer must then seek contribution or indemnity from other tortfeasors by asserting claims against them in the *same* action. *Id.* Without prior knowledge of this procedural requirement, however, FELA defendants would forfeit their right to apportion liability by failing to join third parties in the course of the lawsuit.

The First Circuit has also refused to apportion damages in FELA actions involving pre-existing conditions. *Stevens* v. *Bangor & Aroostook R.R.*, 97 F.3d 594 (1st Cir. 1996). In *Stevens*, there was expert testimony that a jury could not decipher the cause of the plaintiff's injuries between a pre-existing condition and an accident in the course of employment. *Id.* at 601. The court acknowledged that FELA "does not provide explicit instructions about the appropriate apportionment of damages when the causes of plaintiff's disability are inseparable." *Id.* at 602. The court decided not to apportion damages, and therefore held the defendant liable for all injuries, in consideration of FELA's primary purpose "to eliminate a number of traditional defenses to tort liability and to facilitate recovery in meritorious cases." *Id.*

There is thus a square and mature conflict among federal courts of appeals and state supreme courts that this Court should resolve. Resolution of this conflict is all the more imperative because the strict rule of joint and several liability followed by the court below is anachronistic. In the absence of express statutory provisions, the Court's duty in interpreting FELA "is to develop a federal common law of negligence . . . informed by reference to the *evolving* common law." *Gottshall*, 512 U.S. at 558 (Souter, J., concurring) (emphasis added). "Instead of a detailed statute codifying common-law principles, Congress saw fit to enact a statute of the most general terms, thus leaving in large measure to the courts the duty of fashioning remedies for injured employees in a manner analogous to the development of tort remedies at common law." *Kernan* v. *American Dredging Co.*, 355 U.S.

426, 432 (1958). In recent years, the clear evolution of the common law has been away from joint and several liability (and even for indivisible injuries) in recognition of the fact that defendants should be held responsible only for the damages caused by their own negligence. Joint and several liability is also viewed as an unfair allocation of all risk of uncollectible judgments upon named defendants. FELA defendants are particularly vulnerable in these respects, since they are often the only named defendant and face liability for "even the slightest" causation of an employee's injury. *Rogers* v. *Missouri Pac. R.R.*, 352 U.S. 500, 506 (1957).

Indeed, only 14 states – including West Virginia – have retained the pure form of joint and several liability. See *Restatement (Third) of Torts: Apportionment of Liability* § 17, reporter's note at 151 (2000). Sixteen states have adopted pure several liability, which holds each defendant responsible only for its proportional share of the plaintiff's injuries. *Id.* at 154. For example, Colorado law now provides that "no defendant shall be liable for an amount greater than that represented by the degree or percentage of the negligence or fault attributable to such defendant that produced the claimed injury." Colo. Rev. Stat. Ann. § 13-21-111.5(1) (West 2000). Twenty states have taken intermediate positions between several and joint and several liability, but even many of these provisions hold defendants severally liable under most circumstances. See, *e.g.*, Cal. Civ. Code § 1431.2 (several liability except for economic damages in certain actions); Conn. Gen. Stat. § 52-572h (several liability, except that plaintiff unable to collect for one year may seek reapportionment of uncollectible share); N.Y. C.P.L.R. 1601 (several liability if defendant 50% or less at fault).

State courts hearing FELA actions are required to apply federal law, which in turn should be determined by evolving standards of common law. See *Dice*, 342 U.S. at 361 ("State laws are not controlling in determining what the incidents of [a FELA] federal right shall be."); *Chapman* v. *Union Pac.*

R.R., 467 N.W.2d 388, 393 (Neb. 1991) (FELA "supersedes a state's common and statutory law"). In clear defiance of this directive, the court below applied the minority position still followed in West Virginia in finding N&W jointly and severally liable for highly prejudicial claims based on scant, uncorroborated evidence. As a result of this clear error, N&W is now solely responsible for massive damage awards to former employees, some of whom had been exposed to asbestos for far longer periods of time after their short-term employment with N&W over 50 years ago.

FELA represents a legislative deviation from certain common-law principles for the benefit of injured employees. These statutory mandates, however, do not justify further departures from other prevailing common-law standards in order to hold employers liable for injuries caused by other tortfeasors outside the period of railroad employment. Unfortunately, the courts of West Virginia have joined other courts in taking exactly such steps with drastic consequences for railroad employers. At the same time, other courts have turned to prevailing common-law principles to "consider the general impact, on workers as well as employers, of the general liability rules they would thereby create." *Buckley*, 521 U.S. at 438. This Court should resolve this conflict and ensure the sensible administration of FELA for the interests of all participants in the railroad industry.

III. THE COURT SHOULD GRANT REVIEW BECAUSE THE TWO MAJOR EASTERN RAILROADS NOW FACE THOUSANDS OF EMOTIONAL-DISTRESS CLAIMS FILED IN WEST VIRGINIA FOR THE VERY PURPOSE OF EXPLOITING ANTI-RAILROAD RULINGS OF THIS KIND.

The two conflicts of authority discussed above amply justify certiorari in this case. But, in addition, this Court must take into account the realities of current litigation, and the strong likelihood that the ruling below (if unchecked) will

control the asbestos-related liability of the two major Eastern railroads, Norfolk Southern and CSX, both of whom operate in West Virginia. The reason is that West Virginia already is, and will continue to be, the venue in which virtually all such claims are brought.

The dominant reality is that the plaintiff's bar is now highly coordinated, and actively solicits plaintiffs for suits in favorable jurisdictions as part of a plan of "assembly-line litigation" to mass-produce tort claims for "lottery-size verdicts" against corporations. Mike France, *The Litigation Machine*, Bus. Wk., Jan. 29, 2001, at 116, 120, 122-23. The railroad plaintiff's bar has employed these tactics in asbestos-related FELA actions, and has targeted notoriously pro-plaintiff, populist jurisdictions where large judgments are routinely entered against railroads by juries and upheld by trial judges. Indeed, the popularity of West Virginia courts with the plaintiff's bar is evident from a recent administrative order of the West Virginia Supreme Court of Appeals (a copy of which is lodged with the Court by petitioner). That order declares that there are over 25,000 asbestos-related actions (including 2,500 asbestos-related actions against railroads) currently pending in West Virginia (many involving out-of-state plaintiffs, as discussed below). Administrative Order Re: Motion To Refer Asbestos Litigation To The Mass Litigation Panel ¶¶ 2, 11 (W. Va. Dec. 28, 2000) (Petitioner's Lodging Tab A). Moreover, railroads have no right of appellate review of these actions in the two-tiered West Virginia court system, and the elected West Virginia Supreme Court of Appeals (as was true here) frequently declines review. See Pet. App. 1a-2a.

As a result, the plaintiff's bar is increasingly ushering former railroad employees from other states into the courts of West Virginia to take full advantage of rulings of this kind. Indeed, as indicated by copies of FELA complaints lodged with the Court by petitioner, literally *thousands* of out-of-state plaintiffs have filed FELA claims in West Virginia in

recent years. A large portion of these FELA claims involve allegations of asbestos exposure and emotional distress therefrom. As just a few examples, Norfolk Southern is currently the defendant in a FELA asbestos-related action brought by 627 plaintiffs, only 30 of whom are West Virginia residents. Petitioner's Lodging Tab B. CSX is the defendant in a FELA asbestos-related action brought by 190 West Virginia residents and (astonishingly) 1,822 out-of-state plaintiffs. *Id.* at Tab C. The railroad plaintiff's bar is also aggregating thousands of FELA claims on behalf of out-of-state plaintiffs seeking recovery for other types of injuries. For example, CSX and Norfolk Southern (as successors to Conrail) were defendants in two FELA actions brought by 1,883 plaintiffs, only 124 of whom are West Virginia residents, for alleged repetitive-motion injuries. *Id.* at Tabs D & E. The *in terrorem* effect of such large mass tort actions creates undue pressure on defendants to settle even meritless claims. Cf. *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (Posner, J.).

The railroads are particularly vulnerable to these tactics, because FELA actions may be brought in any district "of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action." 45 U.S.C. § 56. Moreover, railroads may not remove these actions to federal court. See 28 U.S.C. § 1445(a).

Thus, the decision in this case for all practical respects will govern the asbestos-related liability of Norfolk Southern and CSX in future litigation involving thousands of employees. The West Virginia Supreme Court of Appeals has made clear that it will not grant a petition for appeal in these types of cases. On the important and pressing issues in this case which recur in thousands of other cases, this Court should intervene to clarify the limits on railroad liability for emotional-distress damages and to ensure that compensation for these claims is fair and just.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 24, 2001

APPENDICES

APPENDIX A

STATE OF WEST VIRGINIA

No. 002774

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 24th day of January, 2001, the following order was made and entered:

HOMER DYE, LEO THACKER, JETHRO DARL WALKER, MELLINGTON A. WHEELER AND JACK A. LAMBERT,
Plaintiffs Below, Respondents,

vs.

NORFOLK & WESTERN RAILWAY COMPANY, *et al.*,
Defendants Below,

NORFOLK & WESTERN RAILWAY COMPANY,
Defendant Below, Petitioner.

On a former day, to-wit, December 7, 2000, came the petitioner, the Norfolk & Western Railway Company, by Huddleston, Bolen, Beatty, Porter & Copen, Luke A. Lafferre and Rodney L. Baker, its attorneys, and presented to the Court its petition praying for an appeal from a judgment of the Circuit Court of Mingo County, rendered on the 23rd day of September, 1999, with the record accompanying the petition. Previously, on the 22nd day of November, 2000, came the respondents, Homer Dye, Leo Thacker, Jethro Darl Walker, Mellington A. Wheeler and Jack A. Lambert, by James A. McKowen, their attorney, and presented to the Court their written response in opposition thereto.

Upon consideration whereof, the Court is of opinion to and doth hereby refuse said petition for appeal.

A True Copy

Attest: /s/ [Illegible]
Clerk, Supreme Court of Appeals

APPENDIX B

IN THE CIRCUIT COURT OF MINGO COUNTY,
WEST VIRGINIA

[Filed Sep. 23, 1999]

HOMER DYE
Civil Action No. 96-C-235

LEO THACKER
Civil Action No. 96-C-239

JETHRO DARL WALKER
Civil Action No. 96-C-240

MELLINGTON A. WHEELER
Civil Action No. 96-C-241

JACK A. LAMBERT
Civil Action No. 97-C-098

Plaintiffs,

v.

NORFOLK & WESTERN RAILWAY COMPANY, et al.,

Defendants.

FINAL ORDER

This decision pertains to the Defendants' Motion for Judgment as a Matter of Law, or, in the Alternative, for a New Trial and Remittitur. A hearing was conducted and oral arguments presented pertaining to said motion. This Court has reviewed all pertinent legal documents of record, the applicable legal authorities, and has considered the oral arguments presented by the parties. Based upon the foregoing deliberations, and for the purposes of this decision, the Court makes the following Findings of Fact, Conclusions of Law and Decision, to wit:

Findings of Fact

1. A jury trial was conducted on FELA claims asserted by the five (5) Plaintiffs against Norfolk & Western Railway Company. The jury returned verdicts in favor of all five plaintiffs and, on March 8, 1999, the Court entered Judgment Orders for the plaintiffs after deducting offsets for settlements with various manufacturers of asbestos products.

2. During trial, all Plaintiffs testified that they were exposed to asbestos and other toxic airborne contaminants; that their employer failed to warn about the hazards of exposure to said contaminants; that their employer failed to provide protection against the contaminants and about their medical conditions and fears or concerns about developing cancer. A co-worker, Doyle Johnson, also testified about the exposure to the airborne contaminants.

3. Dr. Garritt Schepers testified by videotaped deposition about the scientific, medical and industrial knowledge of asbestos-related medical problems. He also testified about the defendant's representatives attending annual meetings conducted by the Association of American Railroads where hazards of occupational exposure to dust were discussed as early as 1932. He also testified that wide acceptance of the potential for asbestos to cause cancer of the pleural lining existed by at least 1960.

4. Dr. Dominic Gaziano testified that each of the Plaintiffs suffered from pulmonary fibrosis consistent with pneumoconiosis, that the plaintiffs' breathing problems were related to their pulmonary fibrosis and that their pulmonary fibrosis had been caused by their occupational exposure to asbestos and other toxic dusts. He also testified that the Plaintiffs were at greater risk

of developing cancer due to their occupational exposure to toxic dusts.

5. Arnold Brody, a prominent scientist, testified about his research concerning effects of asbestos fibers on the lung and opined that persons inhaling asbestos are at greater risk of contracting cancer.

6. The Plaintiffs introduced documents demonstrating that the defendant knew or should have known the dangers of asbestos and other airborne dusts as early as the 1930s.

7. The Plaintiffs also introduced documents showing, inter alia, that the plaintiffs should have been educated about the risks associated with exposure to airborne dusts; that the defendant should have explored less toxic alternative; that the levels of toxic dust should have been decreased by a variety of means; that respiratory protective equipment should have been provided; that testing on levels of toxic dust should have been performed and that the plaintiffs should have been tested and monitored.

Conclusions of Law

A.

Standards for Granting Motion for Judgment as a Matter of Law, for a New Trial and for a Remittitur

1. In deciding whether to grant a motion for judgment as a matter of law, all evidence must be considered in the light most favorable to the plaintiffs; all conflicts in the evidence are assumed to have been resolved by the jury in the plaintiffs' favor, all facts which plaintiffs' evidence tended to prove are deemed proven, and plaintiffs are entitled to the benefit of all favorable inferences which reasonable [sic] may be drawn from the facts proven. Syllabus Pt. 1, *Finley v. Norfolk &*

Western Railway Co., 1999 WL 503837 (W.Va. July 15, 1999) (per curiam).

2. A motion for a judgment notwithstanding the verdict (now called a motion for judgment as a matter of law) is governed by a different standard than a motion for a new trial. This Court ". . . [m]ay only enter judgment notwithstanding the verdict when 'the facts and inferences point so strongly and overwhelmingly in favor of the movant that no reasonably [sic] jury could have reached a vedict against the movant' ". *Gonzalez v. Conley*, 199 W.Va. 288, 291, 484 S.E.2d 171, 174 (1997) *citing Alkire v. First National Bank of Parsons*, 197 W.Va. 122, 128, 475 S.E.2d 122, 128 (1996).

3. Whereas a motion for a new trial may be granted: "If the trial judge finds the verdict is against the clear weight of the evidence, is based on false evidence or will result in a miscarriage of justice . . .". *Gonzalez v. Conley*, 199 W.Va. 288, 291, 484 S.E.2d 171, 174 (1997).

4. The legal rule concerning the discretion of the trial court to set aside a jury verdict and grant a motion for remittitur is set forth in *Addair v. Majestic Petroleum Co., Inc.*, 160 W.Va. 105, 232 S.E.2d 821 (1997) as follows:

> Courts must not set aside jury verdicts as excessive unless they are monstrous, enormous, at first blush beyond all measure, unreasonable, outrageous, and manifestly show jury passion, partiality, prejudice or corruption.

5. Pertinent considerations in ascertaining whether a jury award is excessive include evidence of medical bills and records, frequency of hospital or doctor visits,

evidence of permanent injury, lost wages, and the physical and emotional appearance of plaintiff at trial. *Adkins v. Foster*, 187 W.Va. 730, 421 S.E.2d 271 (1992).

B.

Errors Asserted by the Defendant in Support Of Defendant's Motions for Judgment as a Matter Of Law, or for a New Trial or for a Remittitur

The Defendant has asserted numerous grounds and errors in support of it's Motions for Judgment as a Matter of Law, for a New Trial or for a Remittitur. In order to ensure that each of the Defendant's grounds or assertions are addressed, this Court will treat each separately in this Order.

a). Is the Defendant entitled to judgment as a matter of law because the facts and inferences at trial point so strongly and overwhelmingly in favor of the Defendants that no reasonable jury could have reached a verdict for the Plaintiffs?

1. Considering all evidence in a light most favorable to Plaintiffs, assuming all conflicts in evidence were resolved by the jury in Plaintiffs' favor, deeming all facts which the Plaintiffs' evidence tended to prove as proven, and conferring upon the Plaintiffs the benefit of all favorable inferences which may have been reasonably drawn from the facts proven, this Court is of the opinion that a reasonable jury could clearly have reached a verdict for the Plaintiffs.

2. The Plaintiffs introduced evidence pertaining to the Plaintiffs exposure to asbestos and other toxic airborne contaminants and concerning the industrial knowledge of occupational exposure to these contaminant [sic]; evidence of the damage to plaintiffs as a result of the exposure and concerning research demonstrating the

greater risk of cancer from such an exposure; evidence of the various methods that should have been used by the Defendants to address the danger of exposure and the Defendants failure to protect the Plaintiffs from the danger, and evidence of the Plaintiffs' fears concerning their condition and the development of cancer.

3. The evidence introduced by the Defendants may have been in conflict with evidence introduced by the Plaintiffs, but it certainly did not rise to being so strongly and overwhelmingly in their favor that a reasonable jury could not have rendered a verdict in favor of the Plaintiffs.

4. Therefore, based upon the foregoing, this Court is of the opinion that the Defendant's assertions fail to rise to the standard necessary for the Court to grant Defendant's Motion for Judgment as a Matter of Law, and the same is hereby DENIED.

b). Is the Defendant Entitled to a New Trial Due to the Plaintiffs' Failure to Prove Liability Under the FELA?

1. This Court has undertaken weighing the evidence introduced at trial and has considered the credibility of the witnesses. The Court finds that the verdict was consistent with the clear weight of the evidence and that the verdict was *not* based upon false evidence nor will the verdict result in a miscarriage of justice.

2. The Defendant asserts that it is entitled to a new trial because the Plaintiffs offered no evidence other than their own testimony concerning exposure to various kinds of airborne contaminants. The Court notes that a co-worker of Homer Dye, Doyle Johnson, also testified about the exposure, and that the Defendant failed to introduce sufficient evidence to controvert the Plaintiffs' testimony about their exposure. There was sufficient evidence that the Plaintiffs were exposed to airborne contaminants. Therefore, this particular

assertion by the Defendant is an insufficient basis for the Court to grant a new trial.

3. The Defendant asserts that the Plaintiffs failed to introduce sufficient evidence to prove their claim, which includes a duty, breach of duty, foreseeability and causation. The Court finds that the Plaintiffs introduced evidence on each of these elements. With respect to duty, the Plaintiffs introduced evidence pertaining to the knowledge in the industry, including the railroad industry, about toxic airborne contaminants. With respect to breach of duty, the Plaintiffs introduced evidence pertaining to the Defendant's failure to exercise reasonable care to provide the Plaintiffs a safe place to work. The Plaintiffs also introduced sufficient evidence concerning the element of foreseeability, including industrial knowledge of the dangers associated with exposure to airborne contaminants, literature published in the medical, scientific and industrial communities; and meetings pertaining to hazards of occupational dust conducted by the Association of American Railroads and attended by representatives of the Defendant. Evidence pertaining to causation included testimony by multiple experts including the medical condition of the Plaintiffs, medical publications concerning the risks of exposure to airborne contaminants and research on effects of exposure to airborne contaminants. Based upon the foregoing, this Court is of the opinion that the jury's verdict was supported by evidence pertaining to duty, breach of duty, foreseeability and causation. Therefore, this court finds this asserted basis for a new trial is without merit.

4. Therefore, based upon the foregoing, the Court finds that the Defendant's Motion for a New Trial based upon the grounds asserted herein are without merit and the Defendant's Motion is DENIED.

c). Is the Defendant Entitled to a New Trial Due to the Court's Error in Submitting the Plaintiffs' "Fear of Cancer" Claim and in Receiving Evidence of the Same?

1. The Defendant asserts that the Court erred in submitting the Plaintiffs' "fear of cancer" claims and in receiving evidence of the same relying primarily upon *Metro-North Commuter Railroad v. Buckley*, 521 U.S. 424 (1997). That case is factually distinguishable from the case at hand in that this case involved plaintiffs who had manifested symptoms of a disease consistent with their exposure to toxic airborne contaminants. Whereas the *Metro-North* case involved plaintiffs who had no physical manifestation of their exposure to airborne contaminants and were bringing suit for the emotional distress associated with their fear of possible physical manifestation, more particularly, cancer.

2. The *Metro-North* case discussed the preclusion of recovery of emotional distress damages where symptoms of a disease had not manifested. However, that decision does *not* preclude recovery for negligently caused emotional distress relating to the manifestation of disease as a result of physical contact with a toxic airborne contaminant.

3. The Plaintiffs introduced evidence substantiating the manifestation of disease as a result of exposure to toxic airborne contaminants. They also submitted evidence pertaining to the increased risks of developing cancer, and they testified concerning their distress at learning of their disease and the increased risk of developing cancer.

4. Further, the issue of whether or not a Plaintiff who suffers emotional distress without a present physical injury can bring an independent action to recover future costs associated with diagnosis of afflictions precipitated by the fear of contracting an affliction was

recently addressed by our Supreme Court of Appeals of West Virginia in *Bower, et al. v. Westinghouse Elec. Corp.*, No 25338 (July 19, 1999). The Supreme Court specifically *rejected* the contention that a claim for future medical expenses must rest upon the existence of present physical manifestation of a disease.

5. Based upon the foregoing, particularly in light of the recent Supreme Court decision in *Bower*, the Defendant's argument that it should be granted a new trial due to the submission of Plaintiffs' emotional distress and fear of cancer claim and the admission of Plaintiffs' evidence pertaining to the same is without merit.

6. With respect to the Defendant's argument that the Court erred in sustaining the Plaintiff's objections to the Defendant's questioning Plaintiffs about their first discussion of "fear of cancer" with their counsel based upon attorney-client privilege, the Court finds this argument, without legal support and without merit.

7. With respect to Defendant's argument that the Court erred in admitting cancer evidence (used to demonstrate that the Defendant should have provided medical surveillance) because the prejudicial effect of the evidence outweighed its probative value, this Court conducted a balancing of the respective parties' interests and found that the probative value of this evidence to the Plaintiffs' claims were greater than any potential prejudice to the Defendant. This asserted basis for a new trial is without merit.

8. Therefore, based upon the foregoing, the Court finds that the Defendant's Motion for a New Trial based upon the grounds asserted herein is without merit and the Defendant's Motion is DENIED.

d). Is the Defendant Entitled to a New Trial Based Upon the Court's Errors in Receiving Certain Evidence and Refusing Other Evidence?

1. The Defendant asserts that the Court erred in permitting the Plaintiffs to introduce evidence pertaining to the "Ancel Wheeler" claim against the Defendant and in refusing to allow the Defendant to introduce the Ancel Wheeler Death Certificate or to permit Dr. Francis Weir or Dr. Joseph Renn to discuss the death certificate.

2. The Plaintiffs introduced the "Ancel Wheeler" claim to demonstrate that the Defendants had notice of a claim pertaining to an employee's development of asbestosis as a result of working for the Defendant railroad. The Court found that the probative value of the evidence outweighed any prejudicial effect to the Defendant. Whatever prejudice may have resulted to Defendant was harmless and the Court finds this basis for a new trial without merit.

3. With respect to the Court's decision to exclude the Ancel Wheeler death certificate, the Defendant sought to use the certificate to rebut that the Defendant was put on notice by the Ancel Wheeler claim. The Defendant's [sic] offered no evidence to prove that the cause of death listed was based upon any examination or autopsy. Further, the Court found that the certificate was being used to show that Ancel Wheeler died years after making his claim against the Defendant railroad which fails to be evidence rebutting notice to the Defendant of claims concerning asbestosis as a result of working for the Defendant. The Defendant failed to show that the evidence was actually being offered in a manner consistent with the Defendant's own representations that it was being offered for rebuttal. Therefore, the Court refused to receive that evidence. Whatever prejudice may have resulted to the Defendant

due to the Court's refusal to allow the Ancel Wheeler Death Certificate was harmless. Therefore, this is an insufficient basis on which this Court could grant a new trial.

4. The Defendant's assertion of Court error in refusing to permit Dr. Francis Weir or Dr. Joseph Renn to discuss the Ancel Wheeler death certificate is without merit based upon the foregoing discussion of the Court's refusal to admit the death certificate.

5. The Defendant asserts that the Court erred in refusing to receive evidence and testimony from N&W Industrial Hygienist David Tucker. However, Defendant failed to proffer an argument which demonstrated to the Court that the evidence was being used for the reason asserted by the Defendant. Therefore, the Court refused to receive said evidence and testimony. The Defendant still fails to advance sufficient argument to show that the evidence was to be used for the reasons advanced by the Defendant. Therefore, this basis for a new trial is without merit.

6. The Defendant asserts that the Court erred in refusing to admit the Plaintiffs' Monongalia County Complaints against asbestos manufacturers. These Complaints included a conspiracy claim wherein the Plaintiffs asserted that the manufacturers conspired to conceal the dangers of asbestos from the public, consumers, users, government and industry. The Defendant wanted to have this evidence admitted to show that the allegations in that suit were inconsistent with the Plaintiffs' allegations against the Defendant in the case at hand. Although the Court found that this evidence was admissible, the Court determined that the danger of confusing the jury with respect to distinguishing the claims asserted in the Monongalia case and those asserted in the case at hand would result in unfair

prejudice to the Plaintiffs that outweighed the probative value of the evidence. The Defendant asserts no additional argument to convince this Court of any impropriety with respect to the Court's ruling. Therefore, this asserted basis for a new trial is without merit.

7. The Defendant asserts that the Court erred in refusing the admission of the Elkhorn Tunnel Studies. The Defendant failed to timely identify and produce this exhibit in accordance with the Court's Scheduling Order. Therefore, this basis for a new trial is without merit.

8. The Defendant asserts that the Court erred in failing to admit a locomotive air sampling study by Dr. Weir. However, the Defendant failed to timely identify and produce this exhibit in accordance with the Court's Scheduling Order. Therefore, this basis for a new trial is without merit.

9. The Defendant asserts that the Court erred in receiving evidence of the Jack Ward Deposition transcript. However, the Defendant fails to detail any prejudice or harm to the Defendant as a result of that particular ruling. Therefore, this asserted basis for a new trial is without merit.

10. The Defendant asserts that the Court erred in receiving the Plaintiffs' medical records, which the Defendant had stipulated were genuine and authentic. The information in those records were admissible pursuant to Rule 803(4) and 803(6) of the West Virginia Rules of Evidence which excludes that such evidence from treatment as hearsay. The Defendant fails to advance convincing argument that those medical records were unduly prejudicial or confusing. Therefore, this asserted basis for a new trial is without merit.

11. The Defendant asserts that the Court erred in admitting evidence of the propensity of asbestos dust to cause cancer. This is essentially the same argument that Defendant advanced concerning the Plaintiffs' "fear of cancer" claim. For purposes of addressing this error, the Court incorporates herein the analysis hereinabove under "c). Is the Defendant Entitled to a New Trial Due to the Court's Error in Submitting the Plaintiffs' "Fear of Cancer" Claim and in Receiving Evidence of the Same?" The Court finds that this asserted basis for a new trial is without merit.
12. The Defendant asserts that the Court erred in receiving Plaintiffs' Exhibit No. 7, affidavit of F. Miller, authenticating a "vial of dust". The Defendant fails to assert a legal argument in support of this allegation of error. Therefore, the Court is precluded from adequately reviewing the same and finds that this basis for a new trial is without merit.
13. The Defendant asserts that the Court erred in admitting Plaintiffs' Exhibit Nos. 2, 8, 9, 10 and 17 pertaining to sandblasting. The Court found that they were relevant and that they were not unduly prejudicial for the purpose that they were being admitted. The Defendant fails to assert a legal argument in support of this allegation of error. Therefore, the Court is precluded from adequately reviewing the same and finds that this basis for a new trial is without merit.
14. The Defendant asserts that the Court erred in admitting Plaintiffs' Exhibit Nos. 12, 13, 14 and 15, which were specifications for products containing asbestos used by the railroad. These exhibits were admitted as genuine, authentic, and relevant, and not unduly prejudicial. The Defendant fails to assert a legal argument in support of this allegation of error. Therefore, the Court is precluded from adequately reviewing the same and finds that this basis for a new trial is without merit.

15. The Defendant asserts that the Court erred in admitting the "Ancel Wheeler Complaint". This essentially [sic] the same argument as asserted hereinabove. For purposes of addressing this asserted error, the Court incorporates fully herein Paragraphs 1 and 2 pertaining to the analysis of the admission of the "Ancel Wheeler Complaint". Based upon the foregoing analysis, the Court finds that this asserted basis for a new trial is without merit.

16. The Defendant asserts that the Court erred in admitting Plaintiffs' Exhibit Nos. 18, 19, 22 and 26. The Defendant fails to advance any legal argument in support of the Defendant's assertion of Court error. Therefore, the Court is precluded from adequately addressing the same and finds that this asserted basis for a new trial is without merit.

17. The Defendant asserts that the Court erred in admitting Plaintiffs' Exhibit Nos. 6, 7, 8, and 9 which were medical records of the Plaintiffs. This assertion was addressed hereinabove under Paragraph 10, and, for purposes of addressing this assertion, the Court fully incorporates herein the analysis contained in Paragraph 10. Based upon the foregoing, the Court finds that this asserted basis for a new trial is without merit.

18. The Defendant asserts that the Court erred in refusing Defendant's Exhibit Nos. 3 (Plaintiffs' Monongalia County Asbestos Complaint), No. 5 (Dr. Weir's locomotive air sampling study), No. 8 (Ancel Wheeler death certificate) and No. 10 (Plaintiffs' medical records). All of these assertions are duplicative and have been addressed hereinabove. Therefore, the Court finds that these asserted bases for a new trial are without merit.

19. The Defendant asserts that the Court erred in failing to sustain objections to improper argument by the

Plaintiffs' counsel. The Defendant fails to identify the alleged improper argument or advance a legal argument in support of this asserted error. Therefore, the Court is precluded from adequately addressing the same and finds this asserted basis for a new trial without merit.

20. The Defendant asserts that the Court erred in receiving testimony from witness Doyle Johnson concerning his previous asbestos case against the Defendant. However, the Defendant's counsel opened the door to the testimony of which Defendant complains during cross-examination of this witness. This Court finds that this asserted basis is without merit.

21. Based upon the foregoing, the Court finds that Defendant's Motion for a New Trial pursuant to the grounds asserted herein is without merit and said Motion is hereby DENIED.

e). Is the Defendant Entitled to a New Trial Based Upon the Court's Errors in Giving Certain Instructions and Refusing Other Instructions?

1. The Defendant asserts that the Court erred in giving its instruction on causation, which included the phrase "however slight" to describe the necessary causal relationship between the defendant's wrongful conduct and the plaintiffs' injuries. The Court finds that the language "however slight" was the proper standard of causation to be applied to the jury. *Gardner v. CSX Transp., Inc.*, 201 W.Va. 490, 498 S.E.2d 473 (1997) (". . . [t]he standard of causation under FELA imposes liability on a railroad if it or its agent's negligence played any part, even the slightest, in producing the employee's injury . . ."). The Court recognizes that FELA still requires that actionable negligence must be established against the employer in order to create liability. However, there is no question that an

actionable negligence claim was supported by the Plaintiffs' evidence in this case. Therefore, the Court finds that this asserted basis for a new trial is without merit.

2. The Defendant asserts that the Court erred in instructing the jury that the Defendant was liable for all Plaintiffs' damages if its negligent conduct caused any portion of those damages. However, the Court's instruction was compelled by the language of FELA, the indivisible nature of the Plaintiffs' injuries, and the established doctrine of joint and several liability. *See*, 45 U.S.C.A. 51 (every common carrier by railroad while engaging in interstate commerce "shall be liable in damages to any person suffering injury while . . . employed by such carrier in such commerce," if the injury resulted "in whole or in part from the negligence of any of the officers, agents, or employees of such carrier. . ."): *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076, 1049-96 [sic] (5th Cir. 1973)(asbestosis is an indivisible injury): *Rice v. Cincinnati, New Orleans & Pacific Railway Co.*, 920 F.Supp. 732 (E.D.Ky. 1996)(if railroad's negligence is causally related to a plaintiff's injuries, the plaintiff can recover all of his damages from the railroad in multiple tortfeasor situations under the doctrine of joint and several liability). Therefore, the Court finds that this asserted basis for a new trial is without merit.

3. The Defendant asserts that the Court erred in refusing the Defendant's Instruction No. 2, entitled "Railroad Not an Insurer". The Court's instructions included a full charge to the jury that the Plaintiffs had the burden to prove negligence and causation. The Defendant's proposed instruction was unnecessary and redundant given the fact that the principles pertaining to negligence and causation were already covered. *See, Roberts v. Stevens Clinic Hospital, Inc.*, 176 W.Va. 492,

345 S.E.2d 791 (1986). Therefore, the Court finds that this asserted basis for a new trial is without merit.

4. The Defendant asserts that the Court erred in refusing Defendant's Instruction Nos. 5, 6 and 7 pertaining to assumption of the risk of cigarette smoking, and aggravation and smoking, respectively. However, the Plaintiffs' diseases for which they sought compensation, silicosis or asbestosis, is not caused by cigarette smoking. Moreover, assumption of risk is not an available defense in FELA cases. *See Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54 (1943); 45 U.S.C. 54. Therefore, this asserted basis for a new trial is without merit.

5. The Defendant asserts that the Court erred in refusing Defendant's Instruction No. 8, which pertains to statute of limitations. However, the Court fully considered and analyzed this issue and ruled that there was no evidence that the Plaintiffs knew or should have known that they had asbestos prior to the three year period before the claims in this case were filed. The Defendant argued that the Plaintiff testified about having respiratory problems more than three years prior to the filing of this action. However, the Defendant's [sic] offered no evidence that the Plaintiffs' [sic] knew or should have known that they had asbestosis. The Defendant fails to proffer any further evidence of notice to Plaintiffs of their condition. Therefore, this asserted basis for a new trial is without merit.

6. The Defendant asserts that the Court erred in refusing to instruct the jury on contributory negligence relating to smoking. Again, the Plaintiffs' occupational diseases could not be caused by cigarette smoking. The Court finds that the refusal of this particular instruction was proper and that this asserted basis for a new trial is without merit.

7. The Defendant asserts that the Court erred in refusing Defendant's Instruction No. 13, which pertained to mitigation of damages as it relates to cigarette smoking. For the reasons set forth hereinabove, the Court finds that this asserted basis is without merit.

8. The Defendant asserts that the Court erred in refusing Defendant's Instruction Nos. 14 and 15, which pertained future damages and calculation of present worth. However, the Court properly excluded those instructions since intangible damages of physical injury, pain and suffering and emotional distress are not to be reduced to present value, and an instruction to the contrary may have constituted reversible error. *O'Byrne v. St. Louis Southwestern Ry. Co.*, 632 F.2d 1285 (5th Cir., Unit A 1980)(per curiam); *Iler v. CSX Transportation, Inc.*, 209 Ga.App. 653, 434 S.E.2d 499 (1993). Therefore, the Court finds that this asserted basis for a new trial is without merit.

9. The Defendant asserts that the Court erred in refusing Defendant's Instruction No. 17 pertaining to the prohibition of punitive damages in FELA actions. However, the Court carefully instructed the jury on exactly what damages could be awarded. Nothing in the instructions or verdict forms suggested that the jury could award punitive damages. Therefore, the Court finds that this asserted basis for a new trial is without merit.

10. The Defendant asserts that the Court erred in failing to give Defendant's Instruction No. 18, which improperly stated the law on "fear of cancer". This Court has fully reviewed and analyzed the "fear of cancer" issue hereinabove under "c. Is the Defendant Entitled to a New Trial Due to the Court's Error in Submitting the Plaintiffs' 'Fear of Cancer' Claim. . .". The Court fully incorporates herein the analysis therein and, based upon

the same, finds that this asserted basis for a new trial is without merit.

11. The Defendant asserts that the Court erred in failing to give Defendant's Supplemental Instruction No. 1 pertaining to the Plaintiffs' right to file an additional claim if the Plaintiffs' developed cancer. The Defendant fails to provide any legal basis for this assertion, precluding the Court from reviewing the same. Therefore, the Court finds that this asserted basis for a new trial is without merit.

12. Based upon the foregoing, the Court hereby finds that the Defendant's Motion for a New Trial based upon Court error in giving certain instruction and refusing other instruction is without merit, and the Court finds that Defendant's Motion is hereby DENIED.

f.) Is the Defendant Entitled to a New Trial By Virtue of an Excessive Verdict?

1. The Defendant asserts that the jury's verdict is against the weight of the evidence. However, the Court finds that there existed ample evidence of damages suffered by each of the Plaintiffs in this matter to support the jury's award. The Court is not persuaded by Defendant's argument that the jury's award was punitive in nature. Further, as more fully discussed hereinbelow concerning the Defendant's assertion of entitlement to a remittitur, the Court finds that the verdict was not excessive. Therefore, the Court finds that this asserted basis for a new trial is without merit and the Defendant's Motion for a New Trial based upon the same is hereby DENIED.

g). Is the Defendant Entitled to a New Trial on the Assertion That the Jury's Award Was Made on a Per Diem Basis?

1. The Defendant asserts that the Jury based its awards to each Plaintiff on a per diem basis. However, the Defendant's assertion is mere conjecture.

2. The general rule is that verdicts may not : ". . . [b]e impeached based on matters that occur during the jury's deliberative process which matters relate to the manner or means the jury uses to arrive at its verdict." Syllabus Point 2, *McDaniel v. Kleiss*, 198 W.Va. 282, 480 S.E.2d 170 (1996). Further, juror confusion over law or evidence may not be used to impeach a verdict. *State v. Scotchel*, 168 W.Va. 545, 285 S.E.2d 384 (1981).

3. The verdict in this case is reasonable based upon the evidence presented at trial and will not be disturbed based upon conjecture.

4. Therefore, based upon the foregoing, the Court finds that this asserted bases for a new trial is without merit.

h). Is the Defendant Entitled to a Remittitur Due to an Excessive Jury Verdict?

1. The respective awards to each of the Plaintiffs in this matter do not appear "monstrous, enormous, at first blush beyond all measure, unreasonable, outrageous, and manifestly show jury passion, partiality, prejudice or corruption". *Addair v. Majestic Petroleum Co., Inc.*, 160 W.Va. 105, 232 S.E.2d 821 (1997). Evidence pertaining to the Plaintiffs [sic] medical conditions, permanent injury, physical and emotional impairment, and pain and suffering was offered at trial supporting the jury's verdict. Therefore, the Court finds that the Defendant's Motion for Remittitur should be and the same is hereby DENIED.

Decision

WHEREFORE, based on the foregoing, this Court hereby ORDERS, ADJUDGES and DECREES that the Defendant's Motion for Judgment as a Matter of Law, or, in the Alternative, for a New Trial and Remittitur is hereby DENIED. The Clerk shall provide copies of this Order to all counsel of record.

ENTERED this 23rd day of September, 1999.

/s/ Michael Thornsbury
The Honorable Michael Thornsbury

A COPY TESTE

/s/ Grant Preece
Circuit Clerk, Mingo County, W.Va.

APPENDIX C

45 U.S.C. § 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

(Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.)

45 U.S.C. § 53. Contributory negligence; diminution of damages

In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

(Apr. 22, 1908, c. 149, § 3, 35 Stat. 66.)

45 U.S.C. § 56. Actions; limitations; concurrent jurisdiction of courts

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

(Apr. 22, 1908, c. 149, § 6, 35 Stat. 66; Apr. 5, 1910, c. 143, § 1, 36 Stat. 291; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167; Aug. 11, 1939, c. 685, § 2, 53 Stat. 1404; June 25, 1948, c. 646, § 18, 62 Stat. 989.)

APPENDIX D

IN THE CIRCUIT COURT OF
MINGO COUNTY, WEST VIRGINIA

In Re:

Civil Action No. 96-C-235
HOMER DYE

Civil Action No. 96-C-241
MELLINGTON A. WHEELER

Civil Action No. 97-C-098
JACK A. LAMBERT

Civil Action No. 96-C-239
LEO THACKER

Civil Action No. 96-C-240
JETHRO DARYL WALKER

Plaintiffs,

v.

NORFOLK AND WESTERN RAILWAY COMPANY
a corporation,

Defendant.

JURY INSTRUCTIONS

INTRODUCTION

First, counsel, the parties and I want to thank you for your patience and attention throughout this case, your care in the consideration of the evidence and patience during recesses and delays.

These instructions are given to you to explain the law as it relates to: 1) the rules which you must follow in your deliberations and in weighing and considering the evidence, and (2) the law governing the claims of the plaintiffs and the defense of the defendant.

As you may know, my role and yours are quit different . It is my duty as a Judge essentially to act as a referee during the trial and to instruct you about the law which applies to this case. It is your duty to decide the facts and, in deciding these facts, to comply with the rules of law and apply the rules of law as I state them to you. If you disagree with the law that I explain to you, you must nevertheless apply that law because you have taken an oath to respect the law of this State.

In your review of the evidence and in reaching a decision, you should not be influenced by sympathy, prejudice or public sentiment.

As you consider these instructions, you should not single out instruction or a part of an instruction and ignore the remainder. Instead, you must consider all of these instructions as a whole and view each instruction in light of all of the others. Also, don't be influenced by the order in which the instructions are presented or by the manner in which I read them to you.

THE JURY' S DUTY

You are the only judges of the facts in this case. In other words, it is your responsibility to decide what the true facts are from all of the evidence which you have seen and heard.

Nothing which I may have said or done during this trial should be considered by you as an indication that I believe or disbelieve certain facts or witnesses. You should disregard any expression or action by me which would seem to indicate any opinion that I have on the facts.

The only evidence that you may consider are the sworn statements of the witnesses, the exhibits that you have been received in evidence and any facts stipulated by counsel.

You should consider all of the evidence whether it has been referred to by me or by the lawyers. As I have told you, the statements of counsel are not evidence unless all of the

lawyers stipulate or agree that a fact is true. When the lawyers stipulate a fact, you may accept that fact as true without the testimony of a witness or any exhibits.

In determining whether any fact has been proved in this case you may, unless I tell you otherwise, consider the testimony of all witnesses, no matter who called them and all exhibits received in evidence, regardless of who may have produced them.

Generally, there are two types of evidence from which you may properly find the truth in a case. One is direct evidence, such as the testimony of an eyewitness. The other is indirect or circumstantial evidence which is the proof of a chain of circumstances pointing to the existence or non-existence of certain facts. The law makes no distinction between direct and circumstantial evidence, but simply requires that you find the facts in accordance with all of the evidence in this case, both direct and circumstantial.

You are to consider only the evidence presented and you may not guess or speculate as to the existence of any facts in this case. But, you may draw from the facts which you find have been proved, such reasonable inferences as seem justified in light of your own experience.

At times throughout the trial, I have been called upon to pass on the admissibility of certain evidence which was offered. Don't be concerned with my rulings or the reasons for them because, whether evidence is admissible or not is a legal question. If I admit evidence to which an objection has been made, I do not determine what weight should be given to such evidence because that is your responsibility. If an objection was sustained, don't guess what the answer might have been or why the question was asked.

CREDIBILITY OF WITNESSES

You, as jurors, are the sole judges of the credibility of the witnesses and the weight of the evidence. As used in these instructions, the "credibility" of a witness means the truthfulness or believability of a witness. The "weight of the evidence" means the extent to which you are or are not convinced by the evidence. The number of witnesses testifying on one side or the other of an issue is not alone the test of the credibility of a witness or the weight of the evidence. If warranted, you may believe a single witness as against a number of witnesses who testify differently. The proper tests are how truthful was the witness and how convincing was his or her testimony in light of all of the evidence and circumstances shown.

In deciding whether the statements of a witness are truthful and convincing or not, you should carefully examine the testimony given, the circumstances under which each witness has testified and every matter in evidence which tends to indicate whether the witness is worthy of belief. Consider each witness's intelligence, motive and state of mind and his or her behavior and appearance while on the witness stand. You should also consider any relation each witness may have to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which each witness is either supported or contradicted by other evidence.

Inconsistencies or discrepancies in the testimony of a witness or between the testimony of different witnesses, may or may not cause the jury to disbelieve such testimony. Two or more persons who witness an incident may see or hear it differently, and innocent misrecollection, like failure of recollection, is not uncommon. Inconsistencies or discrepancies in the testimony of a witness or between the testimony of different witnesses should be considered by you, but, in weighting their effect, you should consider whether they pertain to a matter of importance or to an unimportant

detail, and whether they result from an innocent error or a willful falsehood.

A witness may be discredited or impeached, not only by contradictory evidence, buy also by evidence that at other times the witness has made statements which are inconsistent with the present testimony of the witness. If you believe that any witness has made statements at other times which are inconsistent with the testimony given in this trial, then you should also consider whether the inconsistency results from an innocent error or from a willful falsehood and whether it pertains to a matter of importance or an unimportant detail.

After you have considered all of the factors bearing upon the credibility of a witness which I have mentioned, you may decide to believe all of the testimony of a particular witness, or you may accept or disregard any part of the testimony of a particular witness. In other words, you may give the testimony of any witness such credibility and weight, as you may think it deserves.

In considering a verdict you should take into consideration the fact that not all persons live to the age of expectancy for reasons unrelated to the injuries alleged in this case and other persons live beyond their normal life expectancy. The life expectancy tables that have been admitted in evidence are based on averages and are only an aid for you in your deliberations together with all of the other evidence in the case.

EXPERT WITNESSES

The rules of evidence ordinarily do not permit witnesses to testify to opinions or conclusions. An exception to this rule exists as to persons referred to as "expert witnesses". These are witnesses who, by virtue of education or experience, have become more knowledgeable on a certain subject than the average person.

Witnesses who are recognized as experts may state their opinions about relevant matters and may give their reasons for the opinions. You should consider any expert opinions given in this case and give to such opinions such weight as you believe they deserve. In determining the weight to be given to the opinion of an expert you should consider the education, training and experience of the expert, the basis for the opinion, the reasons given by the witness and the opinions of other similar witnesses on the same matters as well as the rules generally applicable to all witnesses in this case.

BURDEN OF PROOF

In order to recover damages, the plaintiff(s) must prove every element of his/their individual claims by a preponderance of the evidence. By a preponderance of the evidence means by the greater weight of the evidence. A fact is proved by a preponderance (or by the greater weight of the evidence) if you, the jurors, believe that it is more likely true than not true. The burden is also upon the defendant to prove by a preponderance of the evidence that the plaintiffs or any of them were negligent and that their negligence proximately contributed to their injuries.

CLAIMS AND DEFENSES

Although in this trial you have heard evidence concerning the claims of several plaintiffs, you must weight the evidence you have heard concerning each plaintiff's claim individually. Therefore, you must listen to and apply each of the following instructions of law to each plaintiff's case individually. As you listen to these instructions, bear in mind that each instruction relates to each plaintiff's claim individually, and were therefore written to apply to each plaintiff individually.

The mere fact that a plaintiff brings a suit for damages in this Court in and of itself does not in any degree establish a right to such damages. The mere fact of initiating a suit at law

is not to be considered by you as establishing the right of a plaintiff to recover.

The mere fact that the plaintiff may have been exposed to some substance at work and that he may have contracted a condition or disease that results from such exposure does not in and of itself and, without more, make the railroad liable to the plaintiff or raise any presumption of negligence on the part of the defendant railroad.

Claims for job related injuries made by employees of railroad companies which are engaged in interstate commerce are governed by Federal law, specifically the Federal Employers' Liability Act. This law is commonly referred to as "FELA" and this shorthand reference will be used for convenience in these instructions.

The defendant, Norfolk and Western Railway Company, is the successor-in-interest and is responsible for the acts and omissions, if any, of the Virginian Railroad. Any reference in these instructions to Norfolk and Western or N&W should be understood to include the Virginian Railroad.

The defendant in this case, Norfolk and Western Railway Company is a corporation and can act only by its agents or servants. Therefore whenever mention is made of defendant doing or not doing something, it means that the defendant was acting through its agents or servants within the scope of their employment.

Section 1 of the Federal Employers' Liability Act (45 U.S.C. § 51), the law under which the plaintiff has brought this lawsuit, provides in part that:

> Every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for injury or death resulting in whole

> or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

It is agreed that, at the times and places alleged in the complaint, defendant N&W was a common carrier by railroad, engaged in interstate commerce; that each plaintiff was then an employee of defendant N&W, engaged in such commerce; and that the plaintiff's right, if any, to recover in this case is governed by the provisions of the Federal Employers' Liability Act.

Therefore, in order to recover damages under the FELA, the plaintiffs must prove by a preponderance of the evidence that the N&W was negligent and that the negligence proximately caused injuries to them. Under the terms of the Federal Employers' Liability Act, if you find by a preponderance of the evidence that the railroad company was guilty of any negligence whatsoever, and you further find from a preponderance of the evidence that such negligence contributed, however slightly, to the injury of the plaintiff, then your verdict must be in favor of the plaintiff and against the defendant railroad. There may be more than one cause to any injury, however, a plaintiff may recover from the defendant if it is established that negligence on the part of the defendant was a cause of the injury. For the purposes of this action, injury or damage is said to be caused or contributed to by an act or failure to act when it appears from a preponderance of the evidence in the case that the act or omission played any part in brining about or actually causing the injury or damage.

Under FELA, the employer is not held to an absolute responsibility for the safe condition of the workplace, but only to the duty of exercising reasonable care to that end, the

degree of care being commensurate with the danger reasonably to be anticipated.

Negligence is defined as the failure to do what a reasonable careful person would have done under the same or like circumstances, or the doing of something which a reasonably careful person would not have done under the same or like circumstances. In other words, negligence is the failure to exercise reasonable and ordinary care. Specifically, it was the duty of N&W to protect its employees from those hazards at the workplace that it knew or had reason to know of. This duty included the obligation to warn the employees, to provide protective devices and to take other reasonable steps to eliminate the possibility that its employees would be injured by the hazards.

In determining whether the defendant railroad knew or should have known that exposure to some substance would result in injury to the plaintiff, you may look to the evidence in this case bearing upon what has been referred to as the state of the art. The term "state of the art," as used in this case, means that knowledge that was reasonably available at any particular period of time concerning the dangers presented by exposure to asbestos or asbestos containing products.

The defendant railroad was not required to have known everything that is written in the medical or scientific journals. The defendant railroad was under the duty to take reasonable steps to know about available medical and scientific literature to determine the nature and effects of the substances to which its employees were exposed. The law presumes that a person, including a corporation, knows that which, by the use of ordinary care, he could have seen or known had he looked.

Under FELA it was the continuing and nondelegable duty of the Norfolk and Western Railway Company and Virginian Railroad to furnish plaintiff with a reasonably safe place in

which to work. By nondelegable, I mean that the railroads could not depend on a third party to satisfy their duty to furnish a reasonable safe place to work.

Some of the plaintiffs may have had exposure to asbestos at places other than those related to their employment with the Virginian and Norfolk and Western Railroad. If you find that the Railroad was negligent and dust exposures at the Railroad contributed, however slightly, to the plaintiff's injuries, you are not to make a deduction for the contribution of non-railroad exposures. The Court will make any deductions which may be appropriate to make.

Section 53 of FELA provides:

> In all actions brought against any such common carrier by railroad . . . to recover damages for personal injuries to an employee . . . the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished . . . in proportion to the amount of negligence attributable to such employee. . .

Under this section, it was the continuing duty of the plaintiff to exercise reasonable and ordinary care for his own safety and protection. If you find that both the railroad and the plaintiff were negligent, and that their respective negligence was a proximate cause of plaintiff's alleged injury, then the plaintiff will not be barred from recovery, but his recovery will be reduced. To determine the amount of the reduction, you must compare the negligent conduct of the railroad and plaintiff in terms of percentages. You will attribute to each of them that percentage that you find describes or measures that party's negligent contribution to the happening of the injury.

In a FELA case, assumption of the risk is not a defense available to an employer. So, the fact that an employee may have known or could have known of an unsafe condition at

his workplace which resulted in injuries to him does not mean that the employee was contributory negligent.

DAMAGES

The court instructs the jury that the fact that instructions are given you on the subject of damages should not be taken by you as an intimation on the part of the Court that the defendant is or is not liable for the alleged injury and damages complained of.

If you find that the defendant is liable to a plaintiff, you must then decide what amount of damages which you believe will fairly and adequately compensate the plaintiff for his injuries.

Each plaintiff who you have found to have been injured as a result of the fault of the defendant is entitled to recover for physical disability and physical and mental pain and suffering in the past; any disability and physical and mental pain and suffering that may reasonably be expected to occur in the future; any loss of enjoyment of the normal pleasures of life; and any medical expenses that may be reasonably expected to be incurred in the future.

You have heard a great deal of testimony regarding cancer and increased risk of cancer. This testimony is relevant only to judge the genuineness of plaintiffs' claims of fear of developing cancer. As an integral part of damages for mental pain and suffering, any plaintiff who has demonstrated that he has developed a reasonable fear of cancer that is related to proven physical injury from asbestos is entitled to be compensated for that fear as a part of the damages your may award for pain and suffering. On the other hand none of plaintiffs have offered evidence that he actually has cancer or that he will, with reasonable certainty develop cancer in the future. Therefore, you cannot award damages to plaintiffs for cancer or for any increased risk of cancer.

In awarding damages, you should not reduce the amount of damages because you may have found a plaintiff contributory negligent. Any reduction of damages based on the negligence of the plaintiffs will be done by the Court.

DELIBERATIONS AND VERDICT

Following the arguments of counsel, this case will be given to you for decision. Your first responsibility is to select a foreperson—one of your members who will preside over your deliberations and act as your spokesperson. Following this selection, you should carefully review the testimony and the evidence in order to decide the matters in dispute between the parties.

In order to reach a final verdict, your decision must be unanimous. It must likewise represent the considered judgment of each juror. So, it is your duty to consult with one another and to deliberate with a view to reaching an agreement.

If, after a fair and impartial review of the evidence and after hearing and giving due consideration to the opinions of your fellow jurors, you can reach a verdict which each of you individually and all of you as a jury believe is consistent with the law and the evidence, it is your duty to return such a verdict.

If, during your deliberations you should have a question, please write your question on a paper provided and give it to the bailiff. When you have reached a verdict, the Foreman should endorse your verdict on the appropriate forms and you should then tell the bailiff that you have completed your work and have reached verdict. Counsel, the parties and I will then gather to receive your decision.